IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 588 OF 2001

Thane Municipal Corportion
Thane. ..Appellant

Vs.

Smt. Pratibha Waman Bhave ..Respondent

Mr. R.S. Apte for appellant.
Mrs.S.S. Gokhale for respondent.

CORAM: B.H. MARLAPALLE, J.

Date : April 18, 2007.

P.C.:

1. Heard Mr. Apte the learned counsel for the appellant-corporation and Mrs. Gokhale the learned counsel for the respondent.

2. The Corporation had issued a notice dated 27/2/1987 under Section 260 of the Bombay Provincial Municipal Corporation Act, 1949 to the respondent-plaintiff and the same was sought to be challenged in Special Civil Suit No. 248 of 1987. It was stated in the said notice that the construction of

the wall on the two sides of a public well existing in the open space was illegal and it was sought to be demolished within one week from the service of the notice. The plaintiff was not staying in the house where the notice was addressed to and, therefore, it was pasted on his house. As per the plaintiff the notice was pasted on the house on 8/3/1987 and in the said notice at Exh.41 he was granted seven days time to demolish the wall. He, therefore, approached the court below on 11/3/1987 with the suit for a declaration that the notice was illegal and he contended that the construction was made by obtaining permission from the Corporation. When the affidavit was sworn in at Exh.42 on 11/3/1987, the plaintiff was informed that the wall was already demolished and, therefore, he restricted his claim for recovery of costs of the construction of wall i.e. Rs.24,000/-. The learned II Joint Civil Judge, S.D., Thane by his judgment and order dated 31/8/1994 held that the action of demolition of the wall was premature and decreed the suit for the recovery of an amount of Rs.24,000/- with interest at 6% p.a. from 12/3/1987 till realisation of the amount. The said decree came

to be challenged in Civil Appeal No. 124 of 1995 which has been dismissed by the Ld. V Additional District Judge, Thane vide his judgment and order dated 18/12/2000. Hence, this second appeal by the defendant-corporation.

3. It has come in the evidence of P.W.1 Waman Bhave, the husband of the plaintiff, that between the tenements 4 to 6 on one hand and 7 to 9 on the other hand there was an open passage of 14ft. in width and 30 to 35 ft. in length and in this open space a bore-well was existing. The well was without a compound/protection either in terms of a wall or a grill and, therefore, the plaintiff apprehending danger, put up the construction of wall on two sides and on the third side there was already a hut and on the fourth side there was a door. This construction of wall incurred a total expenditure of Rs.24,000/- as has been proved by the payment receipts at Exhs.38, 39 and 40. The trial court noted that the construction of two walls was not an encroachment made by the plaintiff for her own benefits and it was only a safety measure around the bore-well which was in the

open passage.

4. Both the courts below have held that the notice was not served on the plaintiff on 27/2/1987 and the Corporation did not examine any of its employee in support of its claim that the said notice at Exh.41 was pasted on the suit house by the Corporation on 27/2/1987 itself or any other date prior to 5/3/1987. It was the case of the plaintiff, as has come in the evidence of P.W.1 Waman Bhave, that the notice was pasted by the Corporation on the wall of the bore-well on 7/3/1987. However, the Lower Appellate Court has recorded a finding that the notice dated 27/2/1987 was served or the plaintiff saw the notice on 5/3/1987 for the first time and, therefore, the period of seven days even under the said notice would expired on 12/3/1987. However, the wall was demolished on 11/3/1987 itself and, therefore, both the courts below have recorded a concurrent finding that the demolition of the wall was premature and illegal. If seven days time was given to the plaintiff, it was necessary for the Corporation to wait upto 12/3/1987 and to provide the plaintiff an

opportunity to prove that the wall was constructed with prior permission from the Corporation or any of its officers.

5. As noted earlier, the construction of the wall around two sides of the public well was not any encroachment on the public property nor was it by way of an encroachment for any shop or residential dwelling and it was on the contrary only by way of safety measure. It was, therefore, necessary for the Corporation to wait upto 12/3/1987 so as to provide opportunity to the plaintiff to prove that the construction of the suit wall was done after obtaining permission from the Corporation. Therefore, no fault could be found with both the courts below in decreeing the suit for refund of the amount of Rs.24,000/-.

6. The learned counsel for the Corporation contended that even otherwise before the trial court no evidence was led by the plaintiff to show that the construction of the wall was with prior permission. This issue could have been examined, if the Corporation had led evidence and it is now informed

that the impugned decree has already been executed in Darkhast proceeding. However, he is not able to definitely state whether the amount has been deposited in the executing court and Mrs. Gokhale has no instructions, whether the plaintiff has received the said amount.

7. To set at rest the controversy between the parties, in case the amount has not yet been received by the plaintiff, the Corporation is directed to put up a fence around the bore-well (iron grill) or by construction of wall at its own expenses and if the same is done within a period of two months from today, the Corporation is entitled to seek the refund of the amount if it has been deposited in the executing court. In case the plaintiff has received the amount of Rs.24,000/-, she will take appropriate steps to either construct the protection wall or put up an iron grill around the bore-well within a period of two months and the same will be inspected by the Corporation’s competent officer.

8. Save and except the above directions, the

second appeal stands dismissed.

(B.H. Marlapalle,J.)